

¹ *Edwards v. Boeing Co.*, 37 Kan. App. 2d 469, 154 P.3d 532, rev. denied 284 Kan. (2007).

after the original award. The matter was remanded to the Board to modify its Order consistent with the directions of the Court of Appeals.

The Board has considered the record and adopted the stipulations listed in the Award, the findings of fact that are consistent with the findings of the Court of Appeals, and the Court of Appeals' opinion.

ISSUES

Claimant contends the Court of Appeals incorrectly interpreted K.S.A. 44-510e as requiring that a claimant return to an accommodated job in order to be eligible for a work disability after his lay-off from that job.² But even assuming that interpretation to be correct, claimant argues the Court of Appeals ignored uncontroverted evidence that he was receiving accommodations from respondent and his fellow employees to enable him to perform his job after he returned from neck surgery in September 2003. Claimant alleges the Court of Appeals further ignored uncontroverted evidence from Dr. Phillip Mills that he should have certain restrictions on his overhead work and the only reason the restrictions were lifted were at the claimant's request and his statement to Dr. Mills that he could avoid those activities in his job at respondent. Claimant argues that accommodations by the employer are not necessary to find a work disability, only a finding that claimant had restrictions and demonstrated a wage or a task loss.

Respondent argues that in accordance with the mandate from the Court of Appeals, the Board should modify its order to find that claimant is entitled to a 50 percent work disability in Docket No. 258,706, but should not undertake any additional analysis concerning either docketed claim. In particular, the Board must not look beyond the mandate of the Court of Appeals in Docket No. 1,006,143. Respondent states that all amounts due and owing at this time have been paid.

The issues for the Board's review are:

(1) Is the Board mandated to affirm its Order finding that claimant is entitled to a 50 percent work disability in Docket No. 258,706, or upon remand, may the Board make new findings of fact and conclusions of law?

(2) Is the Board mandated to modify its order and affirm the ALJ's finding that claimant has no work disability in Docket No. 1,006,143, or upon remand, may the Board make new findings of fact and conclusions of law?

² See *Roskilly v. Boeing*, 34 Kan. App. 2d 196, 116 P.3d 38 (2005).

FINDINGS OF FACT

Claimant requested review of the March 3, 2005, Review and Modification of an Award Order by Administrative Law Judge (ALJ) Nelsonna Potts Barnes. The Board originally heard oral argument on June 17, 2005, and issued its Order on October 25, 2005. The matter was appealed to the Court of Appeals. The Court of Appeals issued its opinion on March 30, 2007, in which the Board's Order was affirmed in part, reversed in part, and remanded with directions.

The Court of Appeals found that because claimant was terminated from a position where he was accommodated for his low back injuries, he was entitled to an award for work disability in Docket No. 258,706. However, the Court of Appeals found that claimant was not accommodated for his injuries to his neck and did not prove a task loss in Docket No. 1,006,143. Claimant also did not prove that the timing of his medical layoff was suspect as was found in *Gadberry*.³ The court found that all of claimant's increased work disability is attributable to his low back injury.

PRINCIPLES OF LAW

K.S.A. 44-528, the review and modification statute, allows for a modification of an award if

(a) . . . the administrative law judge finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished

The decision by the Court of Appeals becomes the law of the case, and the Board is bound to adhere to its rulings. In *Collier*,⁴ the Kansas Supreme Court stated:

The law of the case doctrine has long been applied in Kansas and is generally described in 5 Am. Jur. 2d, Appellate Review § 605 in the following manner:

"The doctrine of the law of the case is not an inexorable command, or a constitutional requirement, but is, rather, a discretionary policy which expresses the practice of the courts generally to refuse to reopen a matter already decided, without limiting their power to do so. This rule of practice promotes the finality and efficiency of the judicial process. The law of the case is

³ *Gadberry v. R.L. Polk & Co.*, 25 Kan. App. 2d 800, 975 P.2d 807 (1998).

⁴ *State v. Collier*, 263 Kan. 629, 631-32, 952 P.2d 1326 (1998).

applied to avoid indefinite relitigation of the same issue, to obtain consistent results in the same litigation, to afford one opportunity for argument and decision of the matter at issue, and to assure the obedience of lower courts to the decisions of appellate courts.”

. . . .

The cases stating this rule are legion in number, and the rule has been applied in many Kansas cases.

ANALYSIS

The Kansas Court of Appeals remanded these two cases to the Board with specific instructions.

In the present case, it is uncontroverted Edwards returned to accommodated work after his lower back injury in claim Docket No. 258,706. After his second injury, the neck injury in claim Docket No. 1,006,143, Edwards returned to work in a position that continued accommodation for his permanent restrictions related to his lower back injury, but there were no accommodations as a result of his neck injury.

Because Edwards was terminated from a position where he was accommodated for his lower back injuries, we agree with the Board that he was entitled to a work disability award for the lower back claim.

However, we cannot agree with the Board that the Workers Compensation Act allows an unsubstantiated finding of work disability arising under the neck claim when there was no accommodation as a result of that injury and there was no proof of task loss. Furthermore, there are no findings by the ALJ or the Board that the timing of the medical layoff, 7 months after returning from neck surgery, was suspect as in *Gadberry*.

In summary, Edwards was not eligible for a work disability award in the review and modification proceeding because there was no substantial competent evidence his functional impairment or work disability increased as a result of the layoff. See K.S.A. 44-528(a). All of claimant’s increased work disability is attributable to the back injury for which he was afforded accommodated duties by Boeing. . . .⁵

The Board interprets the Court of Appeals’ opinion to say that it is affirming the Board’s October 25, 2005, Order as to Docket No. 258,706, which awarded claimant a 50 percent work disability. As this award was affirmed, it was not remanded and is final. In Docket No. 1,006,143, the neck injury claim, the Court of Appeals found claimant is not

⁵ *Edwards*, 37 Kan. App. 2d at 475-76.

entitled to a work disability. As such, claimant is not entitled to any modification of his original award, which was based on claimant's 20 percent permanent impairment of function.

In Docket No. 1,006,143, the Court of Appeals found claimant was not entitled to his requested review and modification, and the Court of Appeals said that the Board, like the ALJ, should have denied the same. It is puzzling why, then, the Court of Appeals remanded this claim to the Board rather than simply stating in its order that claimant's review and modification is denied or reinstating the award of the ALJ, but apparently the Court of Appeals wants the Board to enter that order. Even though this case was remanded to the Board, we do not agree with claimant's argument that the Board is therefore able to make new findings of fact and conclusions of law. The Court of Appeals foreclosed that right when it held that, as a matter of law, there was no substantial competent evidence that claimant had restrictions, was accommodated, and thereafter suffered any wage or task loss as a result of his lay-off from respondent which can be attributable to his neck injury. It is now the law of the case that claimant has not proven a work disability in Docket No. 1,006,143. That is the mandate of the Court of Appeals.

CONCLUSION

In Docket No. 258,706, claimant is entitled to a modification of his March 26, 2001, Award as set forth in the Board's Order dated October 25, 2005.

In Docket No. 1,006,143, claimant has failed to prove that he is entitled to modification of his December 19, 2003, Award at this time.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Review and Modification of an Award Order entered by Administrative Law Judge Nelsonna Potts Barnes dated March 3, 2005, which finds that in Docket No. 258,706, claimant is entitled to a 50 percent permanent partial disability beginning June 14, 2004, is modified to find the effective date of that modification is April 30, 2004, but is otherwise affirmed as set forth in the Board's Order dated October 25, 2005. In Docket No. 1,006,143, Judge Barnes' March 3, 2005, Review and Modification of an Award Order which denies claimant any modification of his original Award is affirmed.

IT IS SO ORDERED.

Dated this _____ day of January, 2008.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Stephen J. Jones, Attorney for Claimant
Eric K. Kuhn, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge